IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1552

MARRIOTT CORPORATION,
*Petitioner*

v.

PAUL A. RICHARD, *et al.*,
*Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Marriott Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on February 7, 1977 (*infra*, p. 15a).

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 549 F.2d 303 (*infra*, pp. 10a-15a). The opinion of the District Court is not officially reported, but has been unofficially published by the Bureau of National Affairs at 22 Wage & Hour Cas. 1361 (*infra*, pp. 1a-7a).

## JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1977. A motion to file a petition for rehearing out of time was granted on April 4, 1977 (*infra*, p. 17a). The petition for rehearing was denied on the same day with one judge voting to grant rehearing (*infra*, p. 17a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the 1974 Amendments to the Fair Labor Standards Act require employers to both pay employees the full minimum wage and return all tips when, pursuant to an agreement authorized by Department of Labor Regulations, the employees turn over to the employer tips which are used by the employer to satisfy its minimum wage obligation.

2. Whether an employer is liable for full minimum wage payment, and an equal amount in liquidated damages, when the trial court found, as required by Sections 10 and 11 of the Portal to Portal Act of 1947, that the employer conducted itself in good faith and had reasonable ground to believe its pay plan was in compliance with the law.

## STATUTES AND REGULATIONS INVOLVED

1. Section 6 of the Fair Labor Standards Act (29 U.S.C. § 201) sets forth the basic minimum wage obligation of employers, currently $2.30 per hour:

> "Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged



> in commerce or in the production of goods for commerce, wages at the following rates:
>
> (1) not less than $2 an hour during the period ending December 31, 1974, not less than $2.10 an hour during the year beginning January 1, 1975, and not less than $2.30 an hour after December 31, 1975, except as otherwise provided in this section;"

Section 3(m) defines the term "wage" under the statute and contains the provisions with respect to the calculation of wages for employees who receive tips:

> "In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that *the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.*"

The preceeding language with respect to the 50 percent limitation on tips was originally added by the 1966 amendments to the Act. The italicized language above was added in 1974. Before the 1974 Amendments, Section 3(m) read as follows:

"In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that *in the case of an employee who (either himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount.*"

Section 3(t) of the Act defines a "tipped employee" and was unchanged by the 1974 Amendments:

"'Tipped employee' means any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips."

2. The Portal to Portal Act of 1947 (29 U.S.C. § 251), in relevant part, sets forth the circumstances under which employers are relieved of liability for failure to pay minimum wages and liquidated damages because of good faith reliance on administrative regulations. Section 10 provides complete relief from liability if the employer pleads and proves that his action was in good faith in conformity with and in reliance on any written administrative regulation of the Department of Labor Wage and Hour Administrator (*infra*, p. 21a). Section 11 gives a court discretion to reduce or refuse to award liquidated



damages for unpaid wages if an employer shows that his action was in good faith and based on reasonable grounds for believing the action was not a violation of the Fair Labor Standards Act (*infra*, p. 22a).

3. The Wage and Hour Administrator's interpretative regulations governing minimum wage payment under the Fair Labor Standards Act are found at 29 C.F.R. § 531. These regulations specifically authorize pay plans under which an employer and employees agree that tips are to be turned over to the employer for the employer's use in satisfying its full minimum wage obligation (29 C.F.R. § 531.55, *infra*, pp. 20a). According to the regulations money turned over by employees out of tips received by them are removed from the regulations' definition of tips and the 50 percent limitation on tips has no applicability.

## STATEMENT OF THE CASE

### I. The Facts

There are no material factual disputes. The facts chronicle the manner in which an employer, or any other employer who chooses to rely on the officially published regulations of the Wage and Hour Administrator and the plain meaning of Section 3(m), is found to violate the minimum wage law with a compensation system providing employees income at the rate of from $5.50 to $8.00 per hour.

In 1971 Marriott instituted a pay plan for the waiters and waitresses at its Joshua Tree Restaurant in reliance on the published regulations and opinion letters of the Wage & Hour Administrator. The plan was set forth in an employment agreement and modi-

fied with each change in the minimum wage that provided:

> "In consideration of my employment at the Joshua Tree Restaurant, I hereby agree that at the end of each shift I will surrender to my employer all tips collected by me up to a maximum of (the applicable federal minimum hourly wage) for each hour worked. In turn, the management agrees to pay me at least (the applicable federal minimum hourly wage) for each hour worked."

The actual practice differed somewhat from the precise terms of the agreement in that the employees did not surrender tips on a daily basis, but instead accounted for all tips daily, kept the money and at the end of the week, received a check equal to the minimum wage times the number of hours worked, minus statutory tax deductions. This check was then endorsed back to Marriott. The District Court held, and Respondent's counsel admits, that the variance between the agreement and the actual practice was not material because the net effect was identical, and the employees were perhaps marginally better off because of the practice. Under this system, the employees' compensation averaged between $5.50 and $8.00 per hour.

On June 21, 1974, the Acting Administrator issued an opinion letter stating that employment agreements whereby tips were to be accounted for or turned over to the employer were invalidated by the 1974 Amendments (*infra*, pp. 23a-26a). There was no immediate protest by the nation's employers because the Acting Administrator did not make his letter public. The Commerce Clearing House and Bureau of National



Affairs labor reporting services did not publish this letter—and still have not—because the letter is supposedly not a "public domain" letter. Notwithstanding this secrecy, news of the acting Administrator's repudiation of existing precedent, including his own official regulations, reached the National Restaurant Association. The Association obtained a copy of the opinion letter and published it in the July 22, 1974, edition of the Association's *Washington Report*. It was on this date that Marriott first learned of the opinion letter.

Marriott consulted its counsel with respect to the effect of this letter and was advised that the letter was contrary to the official regulations and the plain meaning of the amended Section 3(m). The pay system was continued until June 6, 1975, at which time it was discontinued. The Plaintiffs' brought an action for unpaid wages and liquidated damages on July 10, 1975.

### II. The Decision Of The District Court

The District Court reluctantly held that after May 1, 1974, the effective date of the 1974 Amendments, Congress determined that tipped employees were entitled to an earnings preference over all other employees in that regardless of the amount of tips retained, they were entitled to an additional amount from the employer equal to at least 50 percent of the minimum wage (*infra*, p. 2a). The court characterized the reasoning behind what it interpreted as the legislative mandate as "specious" and "foreign to the . . . thrust of the Minimum Wage Act" (*infra*, p. 2a). Nevertheless, the court ruled according to what it believed to be the intent of Congress.

Basic damages were assessed at the rate of 50 percent of the minimum wage in order to put the Plaintiffs in the position they would have been in had they received compensation under the tip credit. Damages commenced on July 22, 1974, when Marriott learned in the newspaper that the Wage and Hour Administrator had issued an opinion letter conflicting with all previous judicial and administrative authority (*infra*, pp. 3a-4a). Damages ran until June 6, 1975, when Marriott changed its compensation system (*infra*, p. 4a).

In addition, the court awarded liquidated damages in an amount equal to the basic damages. The court specifically found, however, that Marriott conducted itself in good faith as the term is normally understood and had reason to believe that it was in compliance with the Act (*infra*, pp. 5a-6a). Nevertheless, the court interpreted an opinion of the Fourth Circuit in a non-liquidated damages case as holding that an *ex post facto* erasure of good faith is accomplished if an employer litigates but does not prevail on a question where the Wage and Hour Administrator has taken an opposing view (*infra*, p. 6a). The court criticized this result as harsh and, to a certain extent unjust (*infra*, p. 6a).

### III. The Decision Of The Court Of Appeals

The Court of Appeals did not essay an analysis of the interplay between the 1966 Amendments, the 1974 Amendments and the applicable regulations. Although conceding that the practice was lawful before the 1974 Amendments, it erroneously treated the 50 percent tip limitation of 3(m) as having first emerged in 1974. With this plainly erroneous foundation, the Court of Appeals affirmed the District Court and held that in all instances an employer must pay at least one-half the minimum wage in addition to tips left by customers (*infra*, p. 13a).



With respect to the question of liquidated damages, the Court of Appeals said that the opinion of the district court was not "perfectly clear" when it found that Marriott conducted itself in good faith with reason to believe it was in compliance with the law (*infra*, p. 13a). Accordingly, the Court of Appeals held that Marriott did not satisfy the "objective" good faith standard when it continued the pay practice which conflicted with the Administrator's unpublished opinion letter which in turn conflicted with the Administrator's official regulations (*infra*, p. 13a).

Finally, the Court of Appeals disagreed with the District Court's measure of damages. The District Court put Plaintiffs in the position they would have been in had Marriott complied with the court's interpretation of the law and assessed basic (unliquidated) damages at 50 percent of the minimum wage (*infra*, p. 5a). The Court of Appeals held that the full minimum wage was due because Marriott did not inform the employees of the 50 percent tip limitation provisions of Section 3(m) (*infra*, p. 14a). This interpretation effectively doubled Marriott's damages.

Thus, statutory language stating that the 50 percent tip credit "shall not apply" was effectively interpreted to mean that it applies four times over and the employees were entitled to all tips, the full minimum wage and a like amount in liquidated damages (*infra*, p. 15a). Although briefed extensively, nei-

ther court addressed the patent inconsistency between its interpretation and the continuing legality of a service charge under which an employer can accomplish unilaterally that which he apparently cannot accomplish by contract (*infra*, p. 18).

## REASONS FOR GRANTING THE WRIT

1. The construction of the minimum wage provisions by the courts below is contrary to both the language and fundamental purpose of the statute. There can be no doubt that the intent of Congress in passing the minimum wage provisions was only to set a minimum wage. Any sum above that was to be left to negotiations between the employer and employee.[1]

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[1] Senator Black stated at 81 Cong. Rec. 7808:

"The committee was of the opinion that it was not wise for the Federal Government to attempt to fix wages in this country above the minimum. The Committee was of the opinion that that should be left to bargaining between the employees and employers, and that the jurisdiction should be left at that point—simply to provide a minimum wage."

Senator Borah stated at 83 Cong. Rec. 9175:

"Congress has no authority to deal with other wages. All wage earners have a constitutional right to bargain for whatever wage they choose. The Federal Government only has authority to deal with minimum wages because minimum wages and hours of employment relate to the health and general welfare of the citizens and it legislates in this field solely because it can be justified on humanitarian grounds. Both federal and state constitutions forbid the fixing of any wage by law other than the minimum."



In *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386 (1942) this Court first considered the relationship between tips and wages under a pay plan essentially the same as that used by Marriott in this case. In *Williams* the employers used an "accounting and guarantee" system under which they underwrote the minimum wage for their employee redcaps and agreed to make up the difference if tips did not at least equal the minimum wage. The redcaps argued that the language of Section 6 that the ". . . the employer shall pay . . ." compelled the terminal companies to pay wages from their own pocket irrespective of tips. This Court looked to the Act's fundamental purpose and held it required only that workers "*receive*" the minimum wage and except for that requirement the Act did not interfere with the employer's freedom to ". . . work out the compensation problem in his own ways." 315 U.S. at 408.

The relevance of this Court's holding in *Williams* to this case cannot be understated. It is nothing less than an employer's statutory obligation to *pay* the minimum wage is satisfied if an employee *receives* that amount, even if the source is the employer's customers.[2]

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[2] In addition to the *Melton* case, *infra* at 17, the only other federal court decision on the question after the 1966 Amendments was *Hodgson* v. *Bern's Steak House, Inc.*, 20 Wage & Hour Cas. 261 (M.D. Fla. 1974). The court there held squarely that *Williams* type agreements were lawful after the 1966 Amendments. Before the 1966 Amendments decisions upholding the tip agreement are numerous. *Southern Ry.* v. *Black*, 127 F.2d 280 (4th Cir. 1942); *Harrison* v. *Terminal R. Ass'n of St. Louis*, 126 F.2d 421 (8th Cir. 1942); *Ryan* v. *Denver Union Terminal Co.*, 126 F.2d 782 (10th Cir. 1942).

Congress first addressed the question of tips and their role in the minimum wage law in 1966. Analysis of what Congress did and did not do in the 1966 Amendments is critical to a reasoned interpretation of its 1974 action. The key language in the 1966 Amendment is that tips are considered part of the minimum wage, but ". . . not by an amount in excess of 50 percentum of the minimum wage rate. . . ." It is clear, however, that Congress in 1966 did not intend for the 50 percent limitation to apply to situations where the employment agreement required that tips be turned over to the employer. The Senate Report [3] on the bill that finally emerged from conference plainly states that the *Williams* type agreement was still lawful:

> "The committee believes that the tip provisions are sufficiently flexible *to permit the continuance of existing practices with respect to tips. For example, an employer and his tipped employees may agree that all tips are to be turned over or accounted for to the employer to be treated by him as part of his gross receipts.* Where this occurs, the employer must pay the employee the full minimum hourly wage, since for all practical purposes *the employee is not receiving tip income.*" (emphasis added). S. Rep. No. 1487, 89th Cong., 2d Sess. 12 (1966).

On September 22, 1967, the Labor Department reissued interpretative regulations, as yet unamended, regarding minimum wage payments. These regulations contemplate two situations in which tips or at least money which would otherwise constitute tips,

[3] S. Rep. No. 1487, 89th Con., 2d Sess. (1966).



are removed from the 50 percent limitation of Section 3(m). First, an employer may unilaterally impose a "service charge" amounting to a certain percentage of a customer's bill and use that money to satisfy its entire minimum wage obligation. Second, the *Williams* type agreement is specifically authorized. In both these situations ". . . there is no applicability of the 50 percent limitation on tip credit provided under Section 3(m)." 29 C.F.R. § 531.55 (b).

Thus, as both lower courts recognized, there is no question that Marriott's compensation system was lawful before the 1974 Amendments. If the pay plan was lawful before 1974, the language of the 1974 Amendments to Section 3(m) can only reaffirm its lawfulness.

The 1974 Amendments did not alter the statutory language with respect to the 50 percent tip limitation. There is nothing in either the Amendment nor the Committee Report announcing an intent to overrule *Williams* or the employment agreement concept. Instead, Congress used language from the regulations authorizing the plan and set forth two conditions without which the 50 percent limitation ". . . shall not apply. . . ."

According to the plain language of the statute, the 50 percent rule does not apply unless (1) the employer informs the employee of the tip provision of Section 3(m) and (2) the employee retains all tips received by him. Congress' change in the wording of the statute in 1974 is in perfect congruence with the applicable unamended regulations authorizing agreements whereby tips are credited or turned over

to the employer but providing that in such instances ". . . there is no applicability of the 50 percent limitation on tip credits. . . ." There could be no clearer statutory approval of a regulation.

The court below reads the words as requiring *both* payment of the full minimum wage *and* the retention of all tips. This result is expressly rejected by the very words of the statute. The statutory effect of an employer's not advising employees of the tip credit provisions and assuring retention of all tips is that the 50 percent limitation "shall not apply." Nowhere does the language suggest that where the 50 percent tip credit does not apply there must be a return of all tips to the employee. The only logical reading of the "shall not apply" provision is that if all tips are not retained by the employee then the Act is read as if the tip provisions were not there. Where tips are not retained by the employee then the full minimum wage is due. But the employee cannot lay claim to *both* the full minimum wage and all tips. It has to be one or the other.

The view of the courts below that the 1974 Amendments prohibit agreements requiring that tips be turned over is an assertion without any underlying analytical justification and is refuted by the language of the statute itself. Both the meaning and the effect of the Amendment were plainly to (1) shift the burden for justifying the calculation of the tip credit (2) require that employees be informed of the tip provisions if the credit is to apply and (3) confirm existing law that the 50 percent provision shall not apply unless employees retain all tips received.



It is a basic rule of statutory construction that when a statute has for a considerable period of time received a construction by an administrative agency and is afterwards reenacted in the same words, it is presumed that the construction is satisfactory to Congress because if it were otherwise the words would have been changed. *Taft* v. *Commissioner of Internal Revenue*, 302 U.S. 351, 357 (1938); *Copper Queen Consolidated Mining Co.* v. *Arizona*, 206 U.S. 474, 479 (1906). If Congress intends to alter a rule long and well established, it must either change the words of the statute or disclose its purpose in unmistakable terms. *Takao Ozawa* v. *United States*, 260 U.S. 178, 193 (1922). In this case, we have not only a reenactment of the same statutory words, but additional language confirming the existing administrative interpretation of those words.

2. The interpretation of the Court of Appeals and the latest unofficial Labor Department opinion is based on an entirely new and unsupportable theory of statutory construction and results in the inherently contradictory administration of the Act's minimum wage provisions. The court below and the Labor Department's unpublished opinion letter rely primarily on the 1974 Senate Report, S. Rep. No. 690, 93d Cong., 2d Sess. (1974). The Report asserts at page 43 that the provision with respect to the employee's retaining tips was:

> ". . . added to make clear the original Congressional intent that an employer could not use the tips of a 'tipped employee' to satisfy more that 50 percent of the Act's applicable minimum wage. H. Rept. 871, 89th Cong., 1st Sess., pp. 9-10, 17-18, 31; 111 Cong. Rec. 21829, 21830;

112 Cong. Rec. 11362-11365, 20478, 22649. See *Melton* v. *Round Table Restaurants, Inc.*, 20 WH Cases 532.67 CCH Lab. Cas. 32630 (N.D. Ga.)."

As shown in the initial section, the statutory language used by Congress in the 1974 Amendments contradicts this assertion. Equally important is the fact that the Report's assertion with respect to the "original Congressional intent" is patently fraudulent. As we have seen, Congress in 1966 intended to permit the continuance of *Williams* type agreements (*supra* at p. 12). The 1974 Senate Report's attempt to manufacture a contrary intent relies on unenacted proposals, gratuitous remarks by an individual senator and a court decision supporting Marriott's position.

The 1974 Senate Report cites initially H.R. Rep. No. 871, 89th Cong., 1st Sess. (1965). That House report was concerned with a different bill (H.R. 10518), introduced and considered a year earlier than the House bill (H.R. 13712) which finally went to conference. A bill that did not pass the house in which it was introduced cannot be considered persuasive authority for determining "original Congressional intent." Moreover, the tip provisions of Section 3(m) as enacted were substantially different from those of H.R. No. 10518.

The reference to 111 Cong. Rec. 21821, 21830 (1965), finds Congressman Roosevelt speaking in favor of H.R. No. 10518, the bill which did not pass.

The reference to 112 Cong. Rec. 11362-5 (1966), chronicles the defeat of the so-called "Goodell Amendment." Congressman Goodell introduced an Amendment that would have allowed all tips to be counted



toward the statutory minimum. It was defeated and an amendment was passed authorizing a 45 percent tip credit. It is submitted that the court below can find precisely the same support in the defeat of the Goodell Amendment that Marriott can find in the failure to pass H.R. 10518. Both are merely proposed legislative changes that did not pass.

The reference to 112 Cong. Rec. 20478, 22649 (1966), finds Senator Yarborough speaking against the 1966 Senate Report, or at least making statements that "an employer cannot rely on tips alone" and that tips cannot exceed 50 percent of the applicable minimum wage. Such remarks are not persuasive and, even when standing alone ". . . have never been regarded as sufficiently compelling to justify deviation from the plain language of a statute." *United States* v. *Oregon*, 366 U.S. 643, 648 (1960).

The decision in *Melton* v. *Round Table Restaurants, Inc.*, 20 Wage & Hour Cas. 532 (M.D. Ga. 1971), supports, rather than denies, an employer's right to agree with employees that tips are to be turned over to him. The court specifically found that the employment agreement was that the employees were to retain the tips. *Id.* at 534. The court further cited with approval the Labor Department's regulations unambiguously authorizing employment agreements whereby employees do not retain all tips.

The employer in *Melton* was merely held to his agreement with his employees. The court noted pointedly that the parties could easily have contracted otherwise. *Id.* at 535.

The holding of the courts below is nothing less than Congress changed the law in 1974, not by amend-

ing statutory language, but by an assertion in a single Congressional Committee Report stating that Congress in 1966 did not really do that which everyone, including Congress, thought it did. The factual evidence for the assertion in the 1974 Senate Report is simply nonexistent.

It is completely untenable to hold that Congress changed completely the meaning of a statute in 1974 by adding language confirming prior consistent interpretations yet negated that very confirmation through a Committee Report erroneously ascribing inconsistent Congressional action 8 years earlier. The meaning of the 1966 Amendments is settled. Congress cannot in this case be said to have changed the statute 8 years later by incorrectly ascribing to itself a contrary earlier intent.

Although not discussed in either lower court opinion in this case, the Labor Department's current view is that while *Williams* type agreements were rendered unlawful by the 1974 Amendments, an employer may still unilaterally impose a "service charge." Opinion Letter No. 1357, 2 CCH Labor Law Rep., Wages-Hours ¶ 30967 (April, 1975).

Under this view, an employer need not bother having his employees sign agreements to account for or turn over a portion of their tips equal to the minimum wage. All an employer need do is instruct his waiters and waitresses to add on 12 percent or 15 percent to the check, collect the money and put it in the cash register. If this course is followed, then the money that would no doubt have gone to the employee as a "tip," goes into the employer's receipts. The economic effect on the employee of the service charge



approach is worse than the employment agreement approach. A service charge allows the employer to generate sufficient additional income to reduce his wage cost to nothing—and perhaps make a profit—depending on how much of the service charge he chooses to return to the employees.

The Administrator rationalizes this inconsistency by asserting that money generated by a service charge is not a "tip" and employees paid with this money are not receiving tip income. But it is precisely this analysis that the Administrator uses in his regulations to hold lawful agreements to turn over tips. 29 C.F.R. §§ 531.55, 531.59.

The economic effect of a service charge and an agreement to turn over tips is precisely the same. This point was made succinctly by the district court in *Williams*, *supra*:

> "It must not be overlooked that the Terminal Company had the legal right, if it had chosen, to have fixed and collected a fee for the service so rendered, and to have received the same, but as an incentive to better service, it allowed the red cap to keep all he collected . . . Since, therefore, the red cap was compensated by the transfer to him of a legal right of the company to charge and collect fees for these services, the legal effect or result is the same, as far as the red cap is concerned, as if the company had collected these fees and paid the red cap directly instead of indirectly." 35 F.Supp. at 271.

The two concepts cannot be distinguished because one is supposedly voluntary on the part of the customer and one is not. The crucial question is whether

the employment agreement results in employees receiving at least the minimum wage, not whether the customer parts with his money voluntarily. If voluntariness is truly the criterion then the Labor Department makes an issue of law turn on the metaphysical question of whether a customer in fact "voluntarily" tips a waiter or waitress. It is submitted that a customer's tip is in reality no more voluntary than the payment of a service charge.

Thus, if Marriott had unilaterally imposed a service charge and paid its employees $2.30 an hour, its conduct would have been clearly lawful. However, because Marriott contracted with its employees and allowed them to ultimately retain the full tip amount, ranging from $5.50 to $8.00 per hour, it is liable for an additional amount equal to the full minimum wage twice over. No wonder neither court below chose to speak to this issue.

3. The holding of the court below with respect to the "good faith" provisions regarding liquidated damages under the Portal-to-Portal Act conflicts with the holdings of the Second and District of Columbia Circuits in *Addison* v. *Huron Stevedoring Corp.*, 204 F.2d 88 (2d Cir. 1953), cert. denied 346 U.S. 877 (1953) and *Laffey* v. *Northwest Airlines, Inc.*, —— F.2d ——, 22 Wage & Hour Cas. 1320 (D.C. Cir. 1976).

The district court found that Marriott conducted itself in good faith with reason to believe it was in compliance with the law. It held, however, that the Fourth Circuit's decision in *Mayhew* v. *Wirtz*, 413 F.2d 658 (4th Cir. 1969) required that full liquidated damages be awarded because Marriott's knowledge of the unpublished opinion letter precluded its "objective" good faith. The Fourth Circuit affirmed with no additional analysis citing *Mayhew*, *supra*.



Under the theory of the courts below, if an employer litigates but does not prevail on a substantial question where the Wage and Hour Administrator takes an opposing view, he cannot do so in "good faith" for Portal-to-Portal Act purposes. If this is the law, it will no doubt reduce Wage and Hour litigation. It will also require employers to each day scour newspapers and trade journals to see if the Wage and Hour Administrator has leaked a recent private letter overruling previous published regulations.

Other circuits take a different view. In *Addison* v. *Huron Stevedoring Corp.*, 204 F.2d 88 (2d Cir. 1953), the court felt constrained ". . . to express disagreement with the view that 'good faith' must meet an objective standard of reasonableness" under the Portal-to-Portal Act. 204 F.2d at 93. The standard requires ". . . only an honest intention to ascertain what the Fair Labor Standards Act requires and to act in accordance with it." *Id.* at 93.

In *Laffey* v. *Northwest Airlines*, 22 Wage & Hour Cas. 1320 (1976) the court, citing *Addison*, agreed that the good faith requirement was subjective and the "honest intention" standard of *Addison* was correct. 22 Wage & Hour Cas. at 1344. The "objective" part of the test is whether the employer had reasonable grounds to believe he was in compliance with the act. *Id.* at 1344. Although the *Laffey* court remanded to the district court on the question of liquidated damages, it did so because it was not clear

that the uncertainty of the law led the employer to believe it was in compliance with the Act. This is not the question in the instant case where the District Court's finding was that Marriott specifically satisfied the Section 11 criteria, but that *any* knowledge of an opposing view negated its good faith.

This Court has not as yet clarified the standard whereby an employer's good faith is to be judged under the Portal-to-Portal Act. If an employer ever acted in good faith as the term is normally understood, it was Marriott, and the district court so found. On the other hand the Labor Department, with the approval of the Fourth Circuit, has formulated an arcane and inconsistent interpretation that turns compliance with the minimum wage law into a game of hare and hounds.



## CONCLUSION

The court below has decided a pure and important question of statutory interpretation in a manner which conflicts with a prior decision of this Court and the plain language of the statute. The interpretation below accepts an irresponsible construction urged by an administrative agency which is at clear variance with that agency's own regulations and inconsistent with fundamental principals of administrative notice. The interpretation below conflicts squarely with the holdings with two other circuits with respect to the "good faith" provisions of the Portal-to-Portal Act. The petition should be granted.

Respectfully submitted,

STERLING COLTON
IVAN H. RICH, JR.
5161 River Road
Washington, D. C. 20016
*Attorneys for Petitioner*

May, 1977

# APPENDIX



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action #75-493A

PAUL A. RICHARD, et al.,
*Plaintiffs*

v.

MARRIOTT CORPORATION,
*Defendants*

ORAL OPINION OF JUDGE D. DORTCH WARRINER

THE COURT: It's cases such as this that try men's souls, I suppose.

The object of the Congress in passing the Minimum Wage Act was clearly one in which they thought they were benefiting the wage earner. There's an abundance of evidence, particularly evidence in the last few years, that they perhaps aren't benefiting anyone by the Minimum Wage Act, but instead they are decreasing substantially the job opportunities for millions of Americans.

Sometimes long after the reason for a rule has disappeared, if it ever existed, the rule continues on.

We have before us today a law that was enacted almost apparently without a reason.

The tip earner's preference which is written to the law is without any legislative history as to why the preference existed, that is, no legislative history other than a unarticulated apparent feeling that something ought to come out of the boss's pocket and into the pocket of the employee, that if you don't do that that somehow or other the boss is getting a free ride and the Congress didn't want the boss to get a free ride.

I think that the argument, such as it may be called, put forward by the proponents of the tipper's preference

is a specious argument and that the amendment which gave the tipper's preference is an amendment that is foreign to the kind of thrust of the Minimum Wage Act.

It's outside of the professed purpose of the act that is to put a floor under employees so that at the least an employee knows that he can not receive less than the minimum wage. It's outside of the thrust of the act. It has no legislative history worthy of the name to support it. It's somewhat obscurely written.

If it existed in 1966, it existed so obscurely that the administrator of the Wage and Hour Act didn't recognize it and found that it was something else again other than that which is contended for by the plaintiffs here.

All of that aside, I am not a lawmaker. I am a judge. I have no writ to decide what Congress does is wise or foolish, advantageous or disadvantageous, fair or unfair. I was elected by no one to make any law for anyone. I am to judge the law as it is.

I find that effective May 1, 1974, Congress determined that persons who received tips are entitled to a preference over all other employees in this country. The constitutionality of that enactment by Congress which certainly affects the tipper's and the employer's right to contract to determine for themselves how they want to handle their mutual affairs, the constitutionality of that is not questioned and, in fact, possibly there's no question about its constitutionality. But that is what it is, and effective the first of May, 1974, persons who received tips, no matter that they received $5 an hour, $50 an hour or our proverbial $500 an hour, were entitled thereafter to another 50 cents an hour.

Try as I may, I can not read that out of the act. It's there and it's my duty merely to recognize that it's there and say so.

I find that there's no question that prior to the first of May, 1974, the defendant had complied for all practical purposes with the act then existing. The difference



is in treatment as to whether or not you turn in your money every night or you merely turn in an accounting for the money once a week, if there's any difference for practical purposes that difference is a preference to the employees and not a detriment to them. It certainly could not be said that it conflicts with the spirit of the act which the spirit is being supposedly to benefit employees because it did benefit employees, it did not constitute a detriment to them in any way.

Now, the amendment of the first of May, 1974, as of that date, and certainly before that date, but certainly as of that date, put the defendant on notice that it should look to its payment practices for tipped employees.

The defendant is required to do that to see whether or not its payment practices for tipped employees is still in compliance with the act in view of the fact that there were amendments, amendments dealing with the very area of payment to tip employees.

Now, it took the Wage and Hour administrator until the 21st of June, 1974, to distribute at least on a limited basis his interpretation of the act. I don't find that unreasonable. There's no evidence before the Court that it's unreasonable for the administrator to take some six to seven weeks to make a determination such as that and put it in financial form and distribute it.

The administrator did not publish his opinion but the defendant through its membership in the National Restaurants Association obtained reasonably prompt notice of the change in position by the administrator brought about by the change in the act, and on the 22nd day of July, 1974, the defendant was alerted to that change of position by reading the then current issue of the NRA Washington Report or Washington Watch or whatever it was.

After the 22nd of July, 1974, the defendant failed to comply with the administrator's interpretation of the act which was an interpretation which, as I have already noticed and held, was in compliance with the

terms of the act, and that failure to comply with the administrator's interpretation was a failure to comply at defendant's peril, and the defendant had a right in a nation of law to say the administrator is wrong, he's wrong by his interpretation of the act.

I asked Mr. Rich how did he resolve the conflict, and he said he resolved it just that way. He said, "I thought at the time that the administrator was wrong," and apparently from their argument here today they still think the administrator was wrong and they had a right so to do so, but they had a right to do that only at their peril.

Stated in the vernacular, they had to put their money where their mouth is. They chose to conclude that the administrator was wrong. The Court has held that the administrator was right, and it follows that the defendant must pay damages.

The Court holds that the plaintiffs are entitled to damages from the enactment from the 22nd day of July, 1974, to the 6th of June, 1975. These, we will call the unliquidated damages, and with respect to the amount of the unliquidated damages, the Court believes the amount should be at the rate of 50 percent of the minimum wage.

I say that because the entire thrust of the Minimum Wage Act is to put a floor under wages. The tip employee preference is not relayed to that thrust because the tip employee preference does not take into account—the preference part of it does not take into account the question of whether or not the floor has been pierced.

It merely says that if you are a tipped employee you are going to get the minimum wage. Moreover, if you get tips in excess of the minimum wage, you will get those tips plus 50 percent of the minimum wage.

I am not sure that Congress understood that it was separating tipped employees from all other employees in giving them this preference. I think it was simply a



do-gooder gesture on the part of Congress. This looked like a good idea at the time so they did it.

Since this infraction is not an infraction that goes to the purpose of the Minmium Wage Act but this infraction is an infraction that goes to what I consider to be, and I think cannot be disputed and apparently is agreed by counsel for plaintiffs, is a module on the Minimum Wage Act, then I am going to fit the infraction to that aspect of the act which was disobeyed and place the defendant in the position that he would have been had he obeyed that aspect of the act, that is to say, that he would get the benefit of the 50 percent credit.

Now, this holding of the Court that there was a conflict, a previous holding that I mentioned, a conflict between the June 21, 1974, letter and the 1967 letter, and the regulations put this defendant in the same position, I believe, as the Mayhew Company where there were emanating from the Government conflicting views as to what the act required.

In Mayhew Company, the defendant discussed with his lawyer what all of these conflicting views netted out to Mr. Mayhew. Mr. Mayhew, all he wanted to do was make money painting houses. He was not a wage and hour man. He talked with his lawyer, and his lawyer said there is a conflict here, there is a difference of opinion, you ought to be entitled to the benefits of the opinion and views being expressed most favorably to you.

The Fourth Circuit said that is not the law. The Fourth Circuit said that, in effect, a conflicting view on the part of the Government erases a good faith defense and requires that the employer accept that interpretation which does him the most harm and supposedly does his employees the most good.

I find, as a matter of fact, that Marriott conducted itself in good faith as that word is ordinarily understood. It perhaps means something other than an absence of bad faith.

The requirement may be more than that, but I find as a matter of fact that the Marriott people conducted themselves toward their employees in good faith, they did have reason to suppose that they were in compliance with the law, but the Mayhew Case creates an ex post facto erasure of good faith.

It says that if it subsequently turns out that the administrator was right, then you have lost your good faith defense, that is to say, despite the fact that good faith existed, you can not interpose that good faith as a defense to liquidated damages.

This seems harsh. To a certain extent, it seems unjust.

Gentlemen, I am not here to make judgments on the rulings of the Fourth Circuit. I am bound by those rulings. Being bound by those rulings, I find that the plaintiffs are entitled to liquidated damages in an amount equal to their unliquidated damages.

Insofar as counsel fees are concerned, the Court finds that the holdings heretofore made mandate that the Court also award counsel fees.

I would suggest that counsel for both parties may agree on what counsel fees are reasonable and allowable in this case, and if they cannot agree, then I would appreciate counsel for plaintiff filing an affidavit setting forth the necessary supporting data along with his motion for counsel fees and costs in an amount certain.

I will be pleased to hear from the defendant if the defendant wants to be heard on the question of the reasonableness of counsel fees.

I would suggest that could be handled as well by briefs as it could by oral argument, and I would suggest further that I can be reached in Richmond as easily as I can here in briefs.

You will file your originals with the Clerk here and send me copies of it.



I think that it's apparent from what I said that I would have voted for the Goodell amendment. I think that it makes better sense, more reasonable, more fair, more in accordance with the purpose of the Minimum Wage Act, but the Congress didn't vote for the Goodell amendment.

Later in 1974, when they had occasion to consider this matter again, they specifically called attention to the previous discussion on this question and made it clear in 1974 that the tipper's preference was from this forward to be unquestionably a part of the law of the land.

I will direct the Clerk to enter a judgment in accordance with the holding of the Court, subject to a later addition to that judgment at the time the Court determines the amount of the counsel fees and costs.

Is there anything further, gentlemen?

MR. STACKHOUSE: No.

MR. VANDER MEER: No, Your Honor.

THE COURT: The Court will be adjourned.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action File No. 75-493-A

PAUL A. RICHARD, et al.

v.

MARRIOTT CORPORATION

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable D. Dortch Warriner, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is Ordered and Adjudged, in accordance with Findings of Fact and Conclusions of Law as stated by the Court, that judgment is hereby entered in favor of the Plaintiff against the MARRIOTT CORPORATION; that Plaintiff is due unliquidated damages from July 22, 1974 to June 6, 1975 in an amount equal to 50% of the minimum wage applicable; that Plaintiff is also due liquidated damages equal to the sum of unliquidated damages; and Plaintiff's attorney is hereby awarded counsel fees. Counsel fees to be determined by the Court upon proper submission as directed from the bench.

Dated at Alexandria, Virginia, this 13th day of January, 1976.

/s/ _____
W. FARLEY POWERS, JR.
Clerk of Court

By /s/ _____
ERNIE K. CONNER



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 75-493-A

PAUL A. RICHARD, et al.

v.

MARRIOTT CORPORATION

ORDER

The Clerk of this Court is directed to enter judgment in favor of plaintiffs against Marriott Corporation in the amount of $43,668.34 with interest thereon from 13 January 1976, said sum to be divided amongst and paid to the persons listed on the attachment hereto in the amounts shown thereon.

Let the Clerk send a copy of this order to all counsel of record.

/s/ _____
D. DORTCH WARRINER
United States District Judge

Date: 15 March 1976

(Attachment omitted)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1496

PAUL A. RICHARD, DEBORAH J. HEITZ, THOMAS E. GOTTSCHALK, STEPHEN G. TEST, JAMES B. STEWART, DONNA L. WATERS, LETITIA M. KASHAWI, on behalf of all other employees of the defendant similarly situated,

*Appellees,*

*versus*

MARRIOTT CORPORATION,

*Appellant.*

W. J. USERY, JR., Secretary of Labor, United States Department of Labor, and Chamber of Commerce of the United States of America,

*Amici Curiae.*

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No. 76-1497

PAUL A. RICHARD, DEBORAH J. HEITZ, THOMAS E. GOTTSCHALK, STEPHEN G. TEST, JAMES B. STEWART, DONNA L. WATERS, LETITIA M. KASHAWI, on behalf of all other employees of the defendant similarly situated,

*Appellants,*

*versus*

MARRIOTT CORPORATION,

*Appellee.*

W. J. USERY, JR., Secretary of Labor, United States Department of Labor, and Chamber of Commerce of the United States of America,

*Amici Curiae.*

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Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. D. Dortch Warriner, District Judge.

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Argued December 8, 1976 Decided February 7, 1977.

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Before CRAVEN, WIDENER and HALL, Circuit Judges.

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Ivan H. Rich, Jr. for Appellant in 76-1496 and for Appellee in 76-1497; Peter K. Stackhouse (Tolbert, Smith, Fitzgerald and Ramsey on brief) for Appellees in 76-1496 and for Appellants in 76-1497; James B. Leonard, Attorney, U.S. Department of Labor (William J. Kilberg, Solicitor of Labor, Carin Ann Clauss, Associate Solicitor, U.S. Department of Labor on brief) for Amicus Curiae.

CRAVEN, Circuit Judge:

In 1974 and 1975 the tips were good at Marriott Corporation's Joshua Tree Restaurant in McLean, Virginia. Each waiter and waitress averaged getting above $5.43 an hour, and some made considerably more. Since the average hourly receipt in tips was far and away more than the federal minimum wage, it seemed sensible to management, and perhaps also to the employees at the time, that Marriott simply underwrite the federal minimum hourly wage, *i.e.*, agree to pay it or make up the difference between the tips and hourly wage in the event the tips did not come to as much as the minimum wage. That was the scheme of employment, and it apparently worked to everyone's satisfaction (because the tips were so large) until Congress amended the Fair Labor Standards Act on May 1, 1974. Section 3(m) of the Act was amended to read as follows:

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

29 U.S.C. § 203(m).

The 1974 Senate Report states the purpose of the provision:

> This latter provision is added to make clear the original Congressional intent that an employer could not use the tips of a "tipped employee" to satisfy more than 50 percent of the Act's applicable minimum wage.

As early as June 21, 1974, the Wage and Hour Administrator issued an opinion letter that, although not officially published, was widely circulated and reprinted in the National Restaurant Association's newsletter in the July 22, 1974, issue. This opinion letter and subsequent ones repudiated earlier opinions and gave notice to Marriott and other employers that tips had to be retained by the employees, that agreements remitting tips to the employer were henceforth invalid, and that the em-



ployer had to pay, regardless of the amount of tips, at least one-half of the minimum wage.

The district court held, upon complaint of Marriott's employees, and we agree, that

> (1) tips belong to the employee to whom they are left, and
>
> (2) an employer must pay his tipped employees at least one-half of the applicable minimum wage in addition to tips left them by customers.

The district court thereupon awarded damages at the rate of 50 percent of the applicable minimum wage from July 22, 1974, the date on which Marriott learned that its pay practice was in conflict with administrative interpretations, to June 6, 1975, the date that it voluntarily ceased its former pay practice and came into compliance with the Act as amended.

Although it is not perfectly clear, we think from our reading of the oral opinion of the district court that it also held that Marriott had failed to satisfy the objective standard of "good faith" contained in Section 11 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 260, when it continued using a pay practice which was in conflict with, and had been repudiated by, a written administrative interpretation that had been brought to its attention. We agree. *See Mayhew, Inc.* v. *Wirtz*, 413 F.2d 658 (4th Cir. 1969).

Only in respect to the measure of damages, and the award of special liquidated damages, did the district court fall into error. Out of a vague sense of fairness and a feeling that $5.43 and up per hour is enough for a wait[e]r[ess], the district judge held that Marriott was entitled to the statutory 50 percent "tip credit" against its minimum wage obligation. But such a conclusion cannot be reconciled with the language of the 1974 amendment of the Congress. Section 3(m), 29 U.S.C.

§ 203(m), provides for such a credit, but then adds these words: "The previous sentence shall *not* apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection. . . ." (Emphasis added.) Marriott never informed its employees of the provisions of Section 3(m) of the Fair Labor Standards Act. To have done so would have invited trouble. An employer cannot reasonably expect employees to happily accept being told that they will not get (one-half) the minimum wage ordered by the Congress.

What the Congress has said, in effect, to restaurant employers is that, if you precisely follow the language of 3(m) and fully inform your employees of it, you may obtain a 50 percent credit from the receipt of tips toward your obligation to pay the minimum wage. The corollary seems obvious and unavoidable: if the employer does not follow the command of the statute, he gets no credit. It is nonsense to argue, as does Marriott, that compliance with the statute results in one-half credit, but that defiance of the statute results in 100 percent credit. We think the conclusion is compelled that the measure of damages for each of Marriott's employees is payment of the applicable minimum wage in full.

Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), provides that "[a]ny employer who violates the provisions of section 206 . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages . . . and in an additional equal amount as liquidated damages." The district court correctly held, we think, that the plaintiffs are entitled to liquidated damages in an amount equal to their unliquidated damages. The language of the statute is mandatory. The Portal-to-Portal Act, however, does permit the district court, "in its sound discretion," to award a lesser amount of liquidated damages, or none at all,



"*if* the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended." Section 11; 29 U.S.C. § 260 (emphasis added).

We have already indicated our agreement with the district court that Marriott did not establish its "objective" good faith. Instead, it took a chance, acted at its peril, and lost. As we said in *Wright* v. *Carrigg*, 275 F.2d 448, 449 (4th Cir. 1960), the limited exception puts upon the "delinquent employer [who would] . . . escape the payment of liquidated damages [a] . . . 'plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict.'" *See Mayhew, Inc.* v. *Wirtz, supra; King* v. *Board of Education*, 435 F.2d 295, 298 (7th Cir. 1970); *Rothman* v. *Publicker Industries*, 201 F.2d 618, 620 (3d Cir. 1953). Here, as the district court stated, the administrator's opinion letter "put the defendant on notice that it should look to its payment practices for tipped employees."

On remand, the district court will amend its judgment to award the full applicable minimum wage to each employee for the specified period, and, in addition, a like amount as liquidated damages. The district court should also consider, on remand, supplementing the award of counsel fees to pay for the prosecution of the appeal.

*AFFIRMED IN PART,*
*VACATED IN PART,*
*AND REMANDED.*

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1496

PAUL A. RICHARD, DEBORAH J. HEITZ, THOMAS E. GOTTSCHALK, STEPHEN G. TEST, JAMES B. STEWART, DONNA L. WATERS, LETITIA M. KASHAWI, on behalf of all other employees of the defendant similarly situated,

*Appellees,*

versus

MARRIOTT CORPORATION,

*Appellant,*

SECRETARY OF LABOR,

*Amicus Curiae,*

CHAMBER OF COMMERCE,

*Amicus Curiae.*

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No. 76-1497

PAUL A. RICHARD, DEBORAH J. HEITZ, THOMAS E. GOTTSCHALK, STEPHEN G. TEST, JAMES B. STEWART, DONNA L. WATERS, LETITIA M. KASHAWI, on behalf of all other employees of the defendant similarly situated,

*Appellants,*

versus

MARRIOTT CORPORATION,

*Appellees,*

SECRETARY OF LABOR,

*Amicus Curiae,*

CHAMBER OF COMMERCE,

*Amicus Curiae.*

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Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. D. Dortch Warriner, District Judge.

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Upon consideration of the motion for leave to file a petition for rehearing out-of-time and the motion to recall the mandate, by counsel,

IT IS ORDERED THAT:

1. the motion for leave to file a petition for rehearing out-of-time is granted;
2. the motion to recall the mandate is denied;
3. the petition for rehearing is denied.

With the concurrence of Judge Craven and Judge Hall, however, Judge Widener would grant rehearing so that the question of good faith could be reconsidered.

For the Court—By Direction

/s/ William K. Slate, II
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action #75-493-A

PAUL A. RICHARD, et al.,
*Plaintiffs*

v.

MARRIOTT CORPORATION,
*Defendants*

JUDGMENT ORDER

In accordance with the prior orders of this Court in the above-styled action, and in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in the appeal and cross appeal of the above-styled action, the following is hereby ADJUDGED and ORDERED:

1. That judgment be and hereby is entered in favor of the plaintiffs and against Marriott Corporation in the following amounts:

a) $43,668.34 as unpaid wages, said sum to be divided amongst the plaintiffs listed on the attachment hereto in the amounts shown thereon. Said amount shall bear interest from January 13, 1976.

b) $43,668.34 as liquidated damages, said sum to be divided amongst the plaintiffs listed on the attachment hereto in the amounts shown thereon. Said amount shall bear interest from January 13, 1976.

c) $10,176.00 as counsel fees for plaintiffs' counsel for the prosecution of the trial. Said amount shall bear interest from February 24, 1976.



d) $7,946.00 as counsel fees for plaintiffs' counsel for the prosecution of the appeal. Said amount shall bear interest from the date of the entry of this judgment order.

2. That the Marriott Corporation is chargeable with and is hereby required to pay the plaintiffs' costs in this action.

3. That this judgment is hereby stayed pending final action by the Supreme Court of the United States on Marriott Corporation's petition for certiorari, provided said petition is filed on or before May 9, 1977, and provided further that Marriott Corporation gives, files or obtains a supersedeas bond, with approved surety, within 21 days following the date of this order in the penalty amount of $120,000.00 conditioned for and upon the payment and satisfaction of the judgment, including counsel fees, costs, interest and damage for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the United States Supreme Court may adjudge and award.

Let the Clerk send a copy of this order to all counsel of record.

ENTERED this 14 day of April, 1977.

/s/ D. Dortch Warriner
United States District Judge

(Attachment omitted)

## 29 CODE OF FEDERAL REGULATIONS
## PART 531—WAGE PAYMENTS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

§ 531.55 Examples of amounts not received as tips.

(a) A compulsory charge for service, such as 10 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and even if distributed by the employer to his employees, cannot be counted as a tip received in applying the provisions of section 3(m) and 3(t). Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amounts so distributed are not counted as tips received. Likewise, where the employment agreement is such that amounts presented by customers as tips belong to the employer and must be credited or turned over to him, the employee is in effect collecting for his employer additional income from the operations of the latter's establishment. Even though such amounts are not collected by imposition of any compulsory charge on the customer, plainly the employee is not receiving tips within the meaning of section 3(m) and 3(t). The amounts received from customers are the employer's property, not his, and do not constitute tip income to the employee.

(b) As stated above, service charges and other similar sums which become part of the employer's gross receipts are not tips for the purposes of the Act. However, where such sums are distributed by the employer to his employees, they may be used in their entirety to satisfy the monetary requirements of the Act. Also, if pursuant to an employment agreement the tips received by an employee must be credited or turned over to the employer, such sums may, after receipt by the employer, be used by the employer to satisfy the monetary requirements of the Act. In such instances, there is no applicability of the 50-percent limitation on tip credits provided by section 3(m).



## PORTAL-TO-PORTAL ACT OF 1947

### 29 U.S.C. § 251

### RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC.

*Section 10* (a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor;

## LIQUIDATED DAMAGES

*Section 11* In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act.



## U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
Washington, D.C. 20213

Jun. 21, 1974

This is in reply to your letters of April 3 and April 10, 1974, requesting an opinion on a proposed pay plan for waiters and waitresses who are in employment which is subject to the pay standards of the Fair Labor Standards Act.

Under the proposed pay plan, the employer would retain all monies generated by tips as reflected on credit charge records. This would be done pursuant to a written and signed agreement between the employer and each of the employees. Each waiter or waitress would be paid at the applicable minimum wage for each and every hour worked in any given workweek. If overtime is worked it would be paid in keeping with the requirements of the law.

Your April 10th letter asks, in addition, as to the propriety of an employer taking all tips, to be turned over by the waiter on a daily or weekly basis, and using such tips to pay the waiters at a rate of compensation that would be equal to the amount of the tips received by them, less the statutory deductions. Should any waiter exceed the overtime standard by working in excess of 48 hours per week, the employer would pay the overtime by taking the gross tips earned by him in a week, divide the gross tips by the number of hours worked and add one-half of this hourly rate to those hours worked in excess of 48.

Section 3(m) of the Act as amended in 1974 contains the following provisions defining the wages of tipped employees:

In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Section 3(t) of the Act contains the following definition:

> "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips.

It is our opinion that an employee who is subject to the Act's pay standards and who meets the statutory definition of a tipped employee is subject to the above cited provisions of sections 3(m) and (t) in determining the bare legal minimum wage which he is entitled to receive from his employer. In other words, where such an employee has retained all tips which he receives from customers, whether in cash or through credit card charges, he must receive in addition to such tips remuneration from his employer of at least 50 percent of the statutory minimum wage for each hour worked in the workweek. Payment of more than 50 percent of the applicable minimum wage will be required when the tips received and the maximum tip credit of 50 percent fail to yield the full minimum wage.



Since the provisions concerning "tipped employees" were adopted in full from the Senate Bill, S. 2747, we must be guided by the clarification of these provisions which is found on pages 42 and 43 of Senate Report No. 93-690. As stated on page 43 of the report, the provision requiring retention of all tips by the employee "is added to make clear the original Congressional intent that an employer could not use the tips of a "tipped employee" to satisfy more than 50 percent of the Act's applicable minimum wage." The amendments to section 3(m) of the Act would have no meaning or effect unless they prohibit agreements under which tips are credited or turned over to the employer for use by the employer in satisfying the monetary requirements of the Act. The specific language added to section 3(m) reinforces, specifically and clearly, the intent of Congress that an employee who receives $20 a month in tips is a tipped employee, and that the employer and employee cannot agree to remove him from that category.

Under the amended Act, a tip becomes the property of the "tipped employee" in recognition of whose service it is presented by the customer. The tip is given to the employee, not the employer. Thus, where an employer acquires the tips of a tipped employee in contravention of section 3(m) and uses such tips to pay the employee, the employee has in effect waived his rights to the minimum wage. However, an employee, including a tipped employee, cannot waive his rights to be paid the applicable statutory minimum wage or required overtime compensation. See *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697. Moreover, no part of any tip repayments may be counted towards satisfaction of the statutory minimum since the employee has been paid nothing by the employer. It cannot be said that an employee has been paid by his employer when the money used is the employee's own money.

Where the employee is a tipped employee under the definition in section 3(t) but the terms of either section 3(m)(1) or (2) are not fully met, such an employee is excluded from the application of the tip credit provision and, therefore, must receive payment from the employer of not less than the full statutory minimum wage. Proper payment to the employee where this has been the case would require the return to the employee of the tips which have been given to the employer plus payment of the full statutory minimum wage (and overtime pay where applicable) for all hours worked in the workweek.

Sincerely,

Signed

Warren D. Landis
Acting Administrator

Wage and Hour Division

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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No. 76-1552

MARRIOTT CORPORATION,
*Petitioner*

v.

PAUL A. RICHARD, *et al.*,
*Respondents*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-1552

MARRIOTT CORPORATION,
*Petitioner*
v.
PAUL A. RICHARD, *et al.*,
*Respondents*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a-15a) is reported at 549 F. 2d 303. The opinion of the district court (Pet. App. 1a-7a) is not officially reported.

### JURISDICTION

The judgment of the court of appeals was entered on February 7, 1977. Petition for rehearing was denied by the court of appeals on April 4, 1977. The petition for a writ of certiorari was filed on May 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether an employer which pays no wages out of its own receipts, and whose employees receive only

their tips as compensation violates the minimum wage provisions of the Fair Labor Standards Act.

2. Whether the district court's award of full liquidated damages was proper under Section 11 of the Portal to Portal Act where petitioner knew that its tip payment plan was in conflict with an official administrative ruling of the Department of Labor.

## STATUTES INVOLVED

1. The pertinent tip credit provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, are set out at Pet. 3-4.[1]

2. The pertinent provision of the Portal to Portal Act of 1947, 61 Stat. 84, as amended, 29 U.S.C. 251, *et seq.*, is set out at Pet. 22a.

## STATEMENT

This action was brought by certain present and former employees of the Marriott Corporation under Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. 216 (b) (hereinafter FLSA or the Act), to recover unpaid minimum wages, together with liquidated damages, court costs and attorneys' fees. The employees worked (or had worked) as waiters and waitresses at Marriott's Joshua Tree restaurant in McLean, Virginia. It was stipulated that each of the plaintiffs, during the period from July 5, 1973, to June 6, 1975, signed, as a condition of employment, the following agreement:

> In consideration of my employment at the Joshua Tree Restaurant. I hereby agree that at the end of each shift I will surrender to my employer all tips collected by me to a maximum of (the applicable federal minimum hourly wage) for each hour worked. In turn, the management agrees to pay me at least (the applicable federal minimum hourly wage) for each hour worked.

[1] The applicable minimum wage provision for the Act is 29 U.S.C. 206(b), not 29 U.S.C. 206(a) as set forth in the Petition (Pet. 2-3). The pertinent portion of Section 6(b) is set forth on page 3 of this brief.



In actual practice, the employees did not turn over any tips but, instead, retained them and endorsed back to Marriott the checks they received each week for the statutory minimum wage.[2] Since these checks did not include the amounts deducted for taxes, etc., the employees, in addition to endorsing over their checks, reimbursed Marriott for the taxes and other deductions indicated on the checks. The net result of this arrangement was that Marriott paid no compensation out of its own receipts.

Plaintiff alleged that this arrangement violated Section 6(b) of the Act, 29 U.S.C. 206(b), which requires that

> [e]very employer shall pay to each of his employees . . . who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce . . . wages at the following rates:
>
> (1) not less than $1.90 an hour during the period ending December 31, 1974,
>
> (2) not less than $2 an hour during the year beginning January 1, 1975,
>
> (3) not less than $2.20 an hour during the year beginning January 1, 1976, and
>
> (4) not less than $2.30 an hour after December 31, 1976.

The district court, after reviewing the 1974 amendments to the statutory definition of the term "wage" in

[2] It was stipulated that the tips received by the waiters and waitresses were always in excess of the applicable minimum wage rate.

Section 3(m), held that Marriott's pay plan violated the minimum wage provisions of Section 6(b). Specifically, the district court held that Marriott's pay plan was invalid in view of the explicit requirement in Section 3(m) that employees retain all tips and that these tips not be credited against more than 50 percent of the employer's minimum wage obligation. Accordingly, it ordered the payment of unpaid wages for the period of July 22, 1974, when Marriott first learned of the 1974 amendment to Section 3(m) and its interpretation by the Department of Labor, to June 6, 1975, when Marriott brought its compensation plan into compliance with Section 3(m) of the Act by permitting its employees to retain all tips as well as actually paying them 50 percent of the statutory minimum wage. The district court also awarded liquidated damages in an amount equal to the amount of unpaid wages.

The court of appeals unanimously affirmed the district court's basic ruling that Marriott had violated the minimum wage provisions because of its failure to meet the requirements of Section 3(m) which permit tips, up to a maximum of 50 percent of the statutory wage, to be credited towards an employer's minimum wage obligations,[3] The court of appeals also affirmed the district court's award of full liquidated damages.[4]

---

[3] Following the district court ruling, but prior to the decision by the court of appeals, another district court judge made an independent consistent ruling that the FLSA prohibits compensation plans that permit an employer to use tips to satisfy its entire minimum wage obligation, even if the plan is agreeable to the employees. See the written but unpublished opinion of Judge Albert V. Bryan, Jr. in *Usery* v. *Emersons LTD, et al*, Civil Action No. 76-11-A (E.D. Va. Nov. 23, 1976).

[4] The court of appeals vacated that part of the district court's judgment which had limited the plaintiffs' back pay award to only 50 percent of the minimum wage for all hours worked, and instead ordered an award of 100 percent of the minimum wage. Petitioner does not challenge this ruling.



## ARGUMENT

The decision of the court of appeals is correct. Moreover, there is no conflict among the circuits concerning the FLSA tip credit provisions nor, contrary to petitioner's assertions, concerning the liquidated damages provision of the Portal to Portal Act. Accordingly, there is no need for review by this Court.

1. Petitioner, in essence, contends that Sections 3(m) and 6(b) are alternative wage provisions, and that an employer may either (1) under Section 6(b), pay the minimum wage and recoup it in its entirety through an arrangement with its employees whereby they agree to turn in from tips an amount equal to their cash wages, or (2) under Section 3(m), take a credit for the tips received by its employees, up to 50 percent of the statutory minimum wage, and pay the balance which in no event can be less than 50 percent of the minimum wage (see Pet. 13-14).

Section 3(m) is not, however, an alternative wage provision. It simply defines the word "wage" as that word is used in the Act, and the definition limits the extent to which an employer can use the tip receipts of its employees to satisfy its statutory wage obligation.

Petitioner's contention that Section 3(m) is only an optional wage provision, and that it can continue to use employees' tips (assuming their agreement) to satisfy its statutory wage obligation, completely ignores not only the language of Section 3(m) itself but also the legislative history of the 1974 amendments as will be shown below. Petitioner's reading of Section 3(m) would nullify Congress' intent to create a paying relationship between an employer and its tipped employees, as well as Section 3(m)'s requirement that an employer pay at least 50 percent of the minimum wage to each of its tipped employees regardless of whether they earn more

than that amount in tips. Obviously, if Congress' only intent had been to insure that tipped employees received earnings in an amount equal to the minimum wage, as Petitioner suggests (Pet. 10-11), Congress would have simply required the employers to guarantee such minimum earnings and it would have permitted the employers to make no payment where the tips were sufficient to insure at least the minimum. Indeed, as we discuss more fully below, this was just what Congressman Goddell proposed in 1966. His amendment, however, was defeated, and Congress made it clear—if not in 1966, at least in 1974—that employers must make some payment from their own pockets and that this payment must equal at least 50 percent of the minimum wage. Petitioner's pay plan did not meet this requirement and, we submit, was for that reason invalid.

In order to understand the present treatment of tips under the FLSA, it is essential to review their treatment from the original enactment of the FLSA.

*The FLSA as Originally Enacted*—The original Act made no reference to tips, and there was nothing in the legislative history to indicate whether Congress intended that tips could be counted as wages. Most courts followed the common law and permitted employers to credit tips against their minimum wage obligation whenever there was an agreement to this effect with the employees. The issue reached this Court in *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386 (1942), which held that the common law rules relating to tips would apply, *in the absence of legislation to the contrary*. Specifically, the Court stated:

> In businesses where tipping is customary, the tips, in the absence of an explicit contrary understanding, belong to the recipient [citations omitted]. Where, however, an arrangement is made by which the employee agrees to turn over the tips to the employer, *in the absence of statutory interference*, no reason is perceived for its invalidity [315 U.S. at 397; emphasis added].



In the Court's view, the FLSA as it then read, required only that covered employees must receive a basic minimum wage. "Except for that requirement [the Court concluded] the employer [is] left free, insofar as the Act [is] concerned, to work out his compensation problem in his own way" (315 U.S. at 408).

*1966 Amendments*—The 1966 amendments to the FLSA revised the definition of "wages" in Section 3(m) by specifying for the first time how the wages of tipped employees were to be determined under the FLSA; these amendments also added Section 3(t), which defined the term "tipped employees" (see Pet. 3-4).

In the hearings leading up to these amendments, Congress was faced with "two diametrically opposite views" on how to treat tips under the FLSA; restaurant employees argued that tips should not be counted towards the employer's minimum wage obligation, whereas restaurant owners argued that all tips should be counted. (Statement of Congressman Dent, a sponsor of the House bill and a leading member of the subcommittee in charge of the bill, 112 Cong. Rec. 11363 [May 25, 1966]).[5] The provision finally enacted by Congress permitted an employer to credit towards a tipped employee's wage the amount of tips actually received, up to a maximum of 50 percent of the applicable minimum rate. (See Pet.

[5] For the conflicting views, see, *e.g.*, *Hearings Before the General Subcommittee on Labor of the House Committee on Education and Labor*, 89th Cong., 1st Sess. Pt. 2 (1965), at pp. 1052, 1099-1100; *Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 89th Cong., 1st Sess., Pt. 1 (1965), at pp. 133, 655. The restaurant owners made Congress aware that a majority of the waiters and waitresses collected tips which averaged more than the applicable minimum wage.

3-4). Congressman Roosevelt (who was chairman of the House Subcommittee), explained the 50 percent limit as follows:

> [W]e do not want to establish a relationship between the employee and the employer where the employer pa[ys] nothing whatsoever under the law . . . [T]he employer should be required to make some reasonable payment. We settled upon the 50 percent amount. [111 Cong. Rec. 21830 (August 25, 1965)].[6]

Prior to the final enactment of the 50 percent limit, the House considered other lower limits—ranging from 35 to 45 percent of the applicable minimum wage rate. During this debate Congressman Goodell introduced a floor amendment which would have credited toward the minimum wage payment of a tipped employee the *actual* amount of tips received, regardless of how high (or low) that amount might be. See 112 Cong. Rec. 11362 (May 25, 1966). As Goodell said, "My amendment would simply permit the employer to credit whatever tips are received, whether it is 35 cents, 10 cents, or $4.50" (112 Cong. Rec. 11363). Noting that many tipped employees were well compensated out of tips alone, Goodell said, "I do not believe we have any business going in and insisting that an employer pay an additional wage to an employee when the employee may receive in tips as much as $10,000 or $12,000 or more a year" (*ibid.*).

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[6] Although the bill discussed by Congressman Roosevelt was not enacted, the language limiting the tip credit which that bill would have added Section 3(m) ("in no event shall the amount paid by the employer be deemed to be so increased by an amount which is greater than 50 per centum of the minimum wage rate") was virtually identical to the language of the bill enacted in the following year ("not by an amount in excess of 50 per centum of the applicable minimum wage rate"). Compare H.R. 10518, 89th Cong., 1st Sess. (re-printed at p. 45 of H. Rept. No. 871, 89 Cong., 1st Sess. [August 25, 1965]) with Section 3(m) as enacted in 1966 (Pet. 4).



The Goodell amendment was defeated and a substitute amendment, authorizing a tip credit not in excess of 45 percent of the applicable minimum wage rate, was adopted. (For the text of the amendment, see 112 Cong. Rec. 11363-11364; for the vote, see *id.* at 11365). Congressman Goodell, in opposing the substitute amendment, pointed out that under it, "if the employer received $2 or $3 or $10 an hour in tips, the gentlemen's substitute amendment would permit a credit of [only] 45 cents an hour" (112 Cong. Rec. 11364). (The minimum wage was at that time $1.00 an hour). Congressman Dent, however, supporting the substitute amendment, told the house:

> The responsibility for paying for employees always belongs to an employer. To have this Congress take the position officially that it is a requirement of a person going into a restaurant to be served not only to consider the price of the meal but also that it is his responsibility to pay the wages of the employee who serves him for food goes beyond reason. . . . I do not believe that any Member of Congress can really seriously consider this kind of amendment [112 Cong. Rec. 11363].

The bill which passed the House permitted a tip credit up to a maximum of 45 percent of the applicable minimum wage rate.

The Senate passed an identical amendment to Section 3(m) except that it allowed a slightly higher maximum tip credit of 50 percent of the applicable minimum wage. In the Senate Report on the 1966 Amendments, however, there is a broad statement which, if read literally, appears to contradict what the House intended by rejecting the Goodell amendment:

> The committee believes that the tip provisions are sufficiently flexible to permit the continuance of existing practices with respect to tips. For example, an employer and his tipped employees may

> agree that all tips are to be turned over or accounted for to the employer to be treated by him as part of his gross receipts. Where this occurs, the employer must pay the employee the full minimum hourly wage, since for all practical purposes the employee is not receiving tip income [S. Rept. No. 1487, 89th Cong., 2d Sess. (1966), at p. 12].

This language would seem to permit an employer to satisfy his full minimum wage obligation out of tips, rather than limiting his tip credit to 50 percent of the minimum wage. Although the Senate Report was thus in direct conflict with the House action,[7] the Wage and Hour Administrator of the Department of Labor obviously relied on the Senate language in interpreting the tip credit provision added to Section 3(m) by the 1966 Amendment.[8]

---

[7] There is no elaboration of the Senate Report language, or any explanatory discussion in the Senate debates. The conference report, which accepted the Senate bill's 50 percent maximum rather than the House bill's 45 percent maximum, does not otherwise comment on the tip credit provision. H.R. Rept. No. 2004, 89th Cong., 1st Sess. (1966), at p. 17. The Senate Report language could be read consistently with the House language if—despite its apparent breadth—it was limited to situations where the employee's tips were less than or equal to one-half the minimum wage. Thus, if an employee received 40 cents an hour in tips when the minimum wage was $1.00, it would make no difference to the employee whether his employer took the tip credit, or whether the employee turned over his tips to the employer and received back from his employer the minimum wage. In either case, the employee would receive $1.00 an hour. It is only when the employee's tips, are greater than one-half the minimum wage rate that the employee's total earnings would be less under the seemingly broad Senate Report language than under the meaning intended by the House,—and it may be (as would appear from the Senate's 1974 Report) that the Senate in 1966 did not foresee a situation where the employee would agree to turn over tip amounts in excess of one-half the minimum wage rate.

[8] Thus, 29 CFR 531.59 stated in pertinent part as follows:

> Under the employment agreements requiring tips to be turned over or credited to the employer to be treated by him as part of his gross receipts, it is clear from the legislative history that the employer must pay the employee the full minimum hourly wage, since for all practical purposes the employee is not receiving tip income.

Similarly 29 CFR 531.55(b) provided:

> [I]f pursuant to an employment agreement the tips received by an employee must be credited or turned over to the employer, such sums may, after receipt by the employer, be used by the employer to satisfy the monetary requirements of the Act. In such instances, there is no applicability of the 50-percent limitation on tip credits provided by section 3(m).

See also the Wage and Hour Administrator's Opinion Letter No. 631 of July 3, 1967 (CCH Wage-Hour Admin. Rulings ¶ 30,621) which states the same position.



*1974 Amendments*—The 1974 amendments to Section 3(m) require that tipped employees retain all of their tips. They also require (1) that tipped employees be informed by their employer about the provisions of Section 3(m) and (2) that the employer assume the burden of proving that the employee actually receives the amount of tips (up to a maximum of 50 percent of the minimum wage rate) which the employer credits towards his minimum wage obligation.

In explaining these changes, and, in particular, the specific requirement that all tips be retained by the tipped employee, the 1974 Senate Report states:

> This latter provision is added to make clear the original Congressional intent that an employer could not use the tips of a "tipped employee" to satisfy more than 50 percent of the Act's applicable minimum wage. H. Rept. 871, 89th Cong., 1st Sess., pp. 9-10, 17-18, 31; 111 Cong. Rec. 21829, 21830; 112 Cong. Rec. 11362-11365, 20478, 22649. See *Melton* v. *Round Table Restaurants, Inc.*, 20 WH Cases 532, 67 CCH Lab. Cas. 32,630 (N.D. Ga.) ([S. Rept. 93-690, 93d Cong., 2d Sess., p. 43].

By this language, we submit, the Senate itself has completely resolved the ambiguity created by the lan-

guage of the 1966 Senate Report discussed above (and relied upon in the Wage and Hour Administrator's pre-1974 administrative rulings).[9] The citations in the quoted excerpt confirm that fact. The pages cited in House Report 871, 89th Cong., 1st Sess., state as follows:

> . . . [T]he wage paid by an employer to a tipped employee shall be deemed to be increased on account of tips by the amount of tips received by the employee . . . , but such amount shall not exceed 50 percent of the applicable minimum wage rate [H. Rept. 871, p. 9].
>
> . . . [I]n no event can the amount representing tips be deemed to be greater than 50 percent of the applicable minimum wage rate regardless of the prevailing tip practices [*id.*, p. 17].
>
> . . . [T]he wage rate that section 6 of the Act requires an employer to pay an employee shall in the case of a tipped employee be reduced by a certain amount representing such employee's tips but in no case below 50 percent of the applicable minimum hourly rate [*id.*, p. 31].

---

[9] Petitioner alleges and places great weight on the fact that portions of the Labor Department's 1967 interpretative regulations, 29 C.F.R. § 531 (which authorize a pay practice similar to the one used by Marriott) were not formally revised following the 1974 amendment to Section 3(m). (Pet. 12, 13 and 23). In fact, however, several published opinion letters of the Wage and Hour Administrator expressly invalidate those portions of the regulations relied upon by Petitioner. Opinion Letter No. 1362 February 18, 1975, BNA Wage-Hour Manual, 95:51, CCH Wage-Hour Admin. Rulings ¶ 30,975 and Opinion Letter No. 1374, April 30, 1975, BNA Wage-Hour Manual 95:52, CCH Wage-Hour Admin. Rulings ¶ 30,985, each state that the regulations cited by Marriott have been superseded by Section 3(m) as modified in 1974, and that the Labor Department is in the process of revising its interpretative regulations. Petitioner was aware of those opinion letters by the Wage and Hour Administrator, and any reliance on the superseded interpretative regulations was improper.



The next reference in the 1974 Senate Report, 111 Cong. Rec. 21829, 21830, is Congressman Roosevelt's explanation of the purpose for placing a maximum on the benefit that an employer can receive when crediting tips against its statutory minimum wage obligation (see p. 8, *supra*). The Reference to 112 Cong. Rec. 11362-11365 is the House rejection of the Goodell amendment discussed at pp. 9-10, *supra*. The references to 112 Cong. Rec. 20478 and 22649 are statements on the floor of the Senate in 1966 by Senator Yarborough, explaining the tip credit in a way which is consistent with the 1966 House approach and contrary to the 1966 Senate Report:

> There is a limitation that tips cannot exceed 50 percent of the applicable minimum wage. *In other words, an employer cannot rely on tips alone* [112 Cong. Rec. 20478 (August 24, 1966; emphasis added)].
>
> There is a limitation that tips cannot exceed 50 percent of the applicable minimum wage [112 Cong. Rec. 22649 (September 14, 1966)].

The final reference in the 1974 Senate Report is the case of *Melton* v. *Round Table Restaurants, Inc.*, 20 WH Cases 532, 67 CCH Lab. Cas. ¶ 32, 630 (N.D. Ga. 1971), in which a district court ruled that tipped employees should retain all of their tips and that, in addition, the employer should pay 50 percent of the minimum wage out of his own pocket. Specifically, the court disallowed the employer's practice of satisfying its entire minimum wage obligation from the tips of its employees.

Petitioner seeks, as it must, to nullify the importance of these references in the 1974 Senate Report by claiming that they deal with a version of the tip-credit bill that did not pass or that they are merely the statements of individual legislators.

In fact, however, these references constitute the most important and revealing piece of legislative history with

respect to the 1974 amendment to Section 3(m). The significance of these references is the fact that the 1974 Senate Committee *chose* to cite them as an indication of its intention *rather* than citing contrary references that were also generated by the confusion of the 1966 legislative history.

For example, the 1974 Senate Committee chose to cite portions of the 1966 House Report which provides that in no event can tips constitute greater than 50 percent of the employer's minimum wage obligation, rather than citing the 1966 Senate Report which seemed to permit the use of all tips by an employer to satisfy that obligation.

Similarly, the decision to cite the case of *Melton* v. *Round Table Restaurants, Inc.*, 20 WH Cases, 532 (N.D. Ga. 1971), rather than the case of *Hodgson* v. *Bern's Steak House, Inc.*, 20 WH Cases, 261 (M.D. Fla. 1971), shows a conscious and meaningful effort by the 1974 Senate Committee to resolve the confusion and ambiguity caused by the 1966 Senate Committee Report. This choice of *Melton* v. *Round Table Restaurants, Inc., supra*, rather than *Hodgson* v. *Bern's Steak House, Inc., supra*, represents the 1974 Senate Committee's support for a judicial decision which *invalidated* a pay practice under which the employer was using tips as a credit against more than fifty percent (50%) of its minimum wage obligation. The 1974 Senate Committee could have cited the *Bern's Steak House* case, which approved a pay practice just like the Marriott's, and its failure to do so is an effective statement that the 1974 amendment to Section 3(m) was designed to eliminate "Marriott type" pay practices.

Likewise, the statements of Congressman Roosevelt and Senator Yarborough show that Section 3(m), as amended in 1974 was intended to insure that tips must be retained by the employees, and that an employer cannot, under any circumstances, credit or use tips to satisfy more than 50 percent of its minimum wage obligation.



Finally, the reference in the 1974 Senate Report to the defeat of the Goodell Amendment is particularly important to an analysis of the Marriott compensation plan because that plan is virtually identical to the concept proposed by Congressman Goodell. In effect, therefore, the 1974 Senate Committee has analyzed the Marriott compensation plan, and expressly stated that the plan is prohibited by Section 3(m), as amended in 1974.

Shortly after the 1974 Amendments, the Wage and Hour Administrator issued new opinion letters repudiating, based on the amendments, his earlier opinions and stating conclusively that tips must be retained by the employees, that agreements remitting tips to the employer are invalid, and that the employer must pay—in addition to the tips retained by the employees—at least one-half the minimum wage. The first of these opinion letters was issued on June 21, 1974, and others were issued on February 26, 1975, April 30, 1975 and August 12, 1975.[10]

Despite the clear wording of the 1974 Amendments to Section 3(m), the legislative history and the post amendment opinion letters of the Wage and Hour Adminis-

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[10] Of the four opinion letters, all but the first one were published by the BNA or CCH loose-leaf services. See footnote 9, *supra*, for citations of the February 18, 1975 and April 30, 1975 opinion letters. The August 12, 1975 opinion letter appears at Wage-Hour Manual 95:53, CCH Wage-Hour Admin. Rulings ¶30,990. Even though the June 21, 1974, letter was not published, it was widely circulated throughout the industry, as evidenced by references to it in the published opinion letters and by its publication in the July 22, 1974 issue of the National Restaurant Association's "Washington Report". Moreover, despite Petitioner's allegations (Pet. 7), the June 21, 1974 opinion letter was a "public domain" letter available for public inspection, and no effort was made to keep it from publication.

trator, Petitioner nonetheless contends that its employees can, by agreement, waive the provisions of Section 3(m). Nothing is more firmly established, however, than the principle that rights under the Fair Labor Standards Act cannot be waived or diminished by private agreements between employers and employees. See, *e.g.*, *Brooklyn Savings Bank* v. *O'Neil, supra,* 324 U.S. 697; *D. A. Schulte, Inc.* v. *Gangi,* 328 U.S 108 (1945); *Mitchell* v. *Turner,* 286 F.2d 104, 106 (C.A. 5, 1960); *Handler* v. *Thrasher,* 191 F.2d 120, 123 (C.A. 10, 1951); *Caserta* v. *Home Lines Agency, Inc.,* 273 F.2d 943, 946 (C.A. 2, 1959); *Fleming* v. *Warshawsky,* 123 F.2d 622 (C.A. 7, 1941). As this Court stated in *Brooklyn Savings Bank* v. *O'Neil, supra*:

> [A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. [Citations omitted.] Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate. With respect to private rights . . . created by a federal statute, . . . the question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute [324 U.S. at 704-705].

Under these decisions, petitioner's employees cannot waive their right to wages, in addition to tips, paid for out of Petitioner's own receipts; nor can they, by surrendering their tips, reimburse petitioner for all wages paid.

The illegality of the petitioner's compensation plan under the FLSA, as amended in 1974, has been recognized by the 1974 Senate Committee, by the Wage and Hour



Administrator, and by every court that has considered the matter. It is respectfully submitted that these rulings are correct, and that there is no need for this Court to further review the issue.

2. Petitioner's challenge to the award of full liquidated damages ignores the language of Section 11 of the Portal to Portal Act setting forth the conditions under which a district court is granted the discretion to reduce the full liquidated damages otherwise required under Section 16(b) of the FLSA. Those conditions were not met here, and, therefore, full liquidated damages were properly awarded.

Section 16(b) of the Fair Labor Standards Act, under which this suit was brought, provides that "[a]ny employer who violates the provisions of Section . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages . . . *and* in an additional equal amount as liquidated damages" (29 U.S.C. 216(b); emphasis added). These damages are not punitive, but are compensatory in nature (to compensate employees for the injuries they may have suffered by reason of not having the money at the time it was due), and, until the enactment of the Portal to Portal Act, were mandatory. *Overnight Motor Co.* v. *Missell,* 316 U.S. 572, 583-584 (1942). Section 11 of the Portal Act added an exception to the mandatory language in Section 16(b), permitting a court, "in its sound discretion," to award a lesser amount of liquidated damages, or none at all, "*if* the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith *and* that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act, as amended" (Section 11, 29 U.S.C. 260; emphasis added).

The courts of appeals have uniformly held that the limited exception created by Section 11 of the Portal to

Portal Act imposes upon the "delinquent employer [who would] escape the payment of liquidated damages [a] . . . 'plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that would be unfair to impose upon him more than a compensatory verdict.'" (*Wright* v. *Carrigg*, 275 F.2d 448, 449 [C.A. 4, 1960], citing *Rothman* v. *Publicker Industries*, 201 F.2d 618, 620 [C.A. 3, 1953]). *Accord: Newspaper Guild* v. *Republican Pub. Co.*, 8 WH Cases 140, 150-151, 156 (D. Mass. 1948), affirmed 172 F.2d 943 (C.A. 1, 1949); *Caserta* v. *Home Lines Agency, Inc.*, 273 F.2d 943, 947 (C.A. 2, 1959); *McClanahan* v. *Mathews*, 440 F.2d 320, 322-323 (C.A. 6, 1971); *King* v. *Board of Education of City of Chicago*, 435 F.2d 295, 297-298 (C.A. 7, 1970), cert. denied 402 U.S. 980 (1971); *Reid* v. *Day & Zimmerman, Inc.*, 73 F. Supp. 892, 895 (S.D. Iowa 1947), affirmed 168 F.2d 356, 360-361 (C.A. 8, 1948); *Laffey* v. *Northwest Airlines, Inc.*, 22 WH Cases 1320, 1344 (C.A. D.C. 1976, not yet officially reported).

The court of appeals, we submit, in relying specifically on *Wright* v. *Carrig*, *King* v. *Board of Education* and *Rothman* v. *Publicker Industries*, applied the proper test by requiring that Marriott establish that it was both in good faith and that it has reasonable grounds for believing that the continuation of its compensation plan following the 1974 amendment to Section 3(m) was not a violation of the FLSA, as amended, despite its actual knowledge of the contrary position being taken by the 1974 Senate Committee and the Wage and Hour Administrator (Pet. App. 15a).

Petitioner contends, however, that the court of appeals requirement that it establish "objective" good faith was in conflict with the holdings of two other circuits, in *Addison* v. *Huron Stevedoring Corp.*, 204 F.2d 88 (C.A. 2, 1953), cert. denied 346 U.S. 877, and *Laffey* v. *Northwest Airlines, Inc.*, *supra*. It is clear, however, that in the instant case the court of appeals, in referring to the test of "objective" good faith under Section 11, intended to emphasize that under Section 11, "subjective" good faith is not sufficient to vest the district court with the discretion to reduce the normal award of full liquidated damages. This can be seen from the court of appeals' reliance on the additional requirement in Section 11 that an employer must show that it had "reasonable grounds for believing" that its challenged action was not a violation of the FLSA (Pet. App. 15a).



All circuits that have analyzed the issue, including the second circuit in *Addison* v. *Huron Stevedoring Corp.*, *supra*, and the District of Columbia in *Laffey* v. *Northwest Airlines*, *supra*, recognize that subjective good faith is not enough to satisfy the requirement of Section 11, and they each have held that an *objective* standard of reasonableness must be met by an employer if it is to avoid the mandatory liquidated damages provided for in Section 16(b) of the FLSA. See *Mayhew, Inc.* v. *Wirtz*, 413 F.2d 658 (C.A. 4, 1969); *Rothman* v. *Publicker Industries*, *supra*; *Newspaper Guild* v. *Republican Pub. Co.*, *supra*; *McClanahan* v. *Mathews*, *supra*; *King* v. *Board of Education of City of Chicago*, *supra*; *Reid* v. *Day & Zimmerman, Inc.*, *supra*.

> Obviously in section 11 the objective standard of reasonableness is a requirement additional to that of "good faith." *Addison* v. *Huron Stevedoring Corp.*, *supra*, p. 93.
>
> The statutory call for reasonable grounds for a belief in compliance with the Act imposes a requirement additional to good faith, and one that involves an objective standard. *Laffey* v. *Northwest Airlines*, *supra*, p. 1344.

There is no question but that the Section 11 exception to mandatory liquidated damages requires an objective showing by the employer. In this case, both the district court and the court of appeals found that Marriott was unable to meet this substantial burden, and, therefore, whether or not the "good faith" requirement must itself be objective is unimportant.

Moreover, the good faith requirement standing alone has never been recognized as wholly subjective in the sense that an employer's motives or intentions can excuse any pay practice from the danger of mandatory liquidated damages, regardless of how objectively questionable it might be. Even *Laffey* v. *Northwest Airlines, Inc.*, *supra*, which relied on *Addison* v. *Huron Stevedoring Corp.*, *supra*, recognized this fact in noting that "maintenance of a practice of 'highly questionable legality' constitutes bad faith" (22 WH Cases at 1345, n. 276).

The courts below clearly recognized from the stipulated statement of facts that the petitioner's act of continuing its pay practice after the 1974 amendment to Section 3(m) was unreasonable behavior in view of the express statements by the 1974 Senate Committee and the Wage and Hour Administrator that its pay practice violated the FLSA, as amended in 1974. The Court of Appeals found that:

> [I]t [Marriott] took a chance, acted at its peril, and lost . . . as the district court stated, the administrator's opinion letter 'put the defendant on notice that it should look to its payment practices for tipped employees.' (Pet. App. 15a)

For the petitioner to suggest that its action meets the requirements of Section 11, it must argue that a "subjective belief" by the employer is all that is necessary. In fact, however, this argument has been uniformly rejected by all the circuits which have considered the meaning of Section 11.



## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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